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Federal Communications Commission
Office of the Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:)
)
Revision of the Commission's Rules) CC Docket No. 94-102
To Ensure Compatibility with)
Enhanced 911 Emergency Calling Systems)
)
Phase II Compliance Deadlines for Non-)
Nationwide CMRS Carriers)

**QWEST WIRELESS, LLC REQUEST FOR LIMITED WAIVER
OF AUTOMATIC-LOCATION-INFORMATION-CAPABLE
HANDSET PENETRATION REQUIREMENTS**

Qwest Wireless, LLC ("Qwest Wireless")¹ requests a limited, focused and specific waiver of Section 20.28(g)(1)(v) of the Federal Communications Commission's ("Commission") rules dealing with market penetration benchmarks of automatic-location-information ("ALI") capable handsets. The existing rules require Commercial Mobile Radio Service ("CMRS") providers deploying a handset-based enhanced 911 ("E911") Phase II technology to ensure that 95 percent of their subscribers have ALI-capable handsets by December 31, 2005.² Despite good faith efforts, it now appears that Qwest Wireless will slightly miss the established benchmark. Based on current handset penetration levels and future trending evidence, Qwest Wireless expects to achieve 95 percent handset penetration by June 30, 2006. Below Qwest Wireless outlines its path to compliance in support of its waiver request. For good cause shown herein, the Commission should grant Qwest Wireless its requested relief.

¹ This filing is submitted on behalf of Qwest Wireless which includes the former TW Wireless, LLC. As of February 19, 2004, TW Wireless, LLC merged into Qwest Wireless.

² 47 C.F.R. § 20.18(g)(1)(v).

I. QWEST WIRELESS WILL SLIGHTLY MISS THE CURRENTLY-ESTABLISHED HANDSET PENETRATION REQUIREMENTS AND NEEDS A LIMITED SIX-MONTH WAIVER

A. Qwest Wireless Has Made Concerted Efforts To Meet The Commission's December, 2005 Penetration Requirements

Despite its good faith efforts to comply to the letter with the Commission's handset-penetration benchmarks, Qwest Wireless does not expect to achieve a 95 percent handset penetration rate by the end of the year. Rather, it expects a penetration rate around 90 percent (or somewhat larger). This penetration rate is only slightly below that established by the Commission and reflects sustained efforts by Qwest Wireless to comply with Commission rules.

To date, Qwest Wireless has not only achieved the ALI-capable handset penetration benchmarks established by the Commission, it has exceeded *each* of those benchmarks. Qwest Wireless began selling and activating location-capable handsets in January, 2003, a month before the Commission's initial March 1, 2003 "begin selling/activation" requirement.³ Qwest Wireless exceeded the Commission's May 31, 2003 benchmark requiring 25 percent of all new handsets sold to be location-capable, achieving a 28 percent penetration rate.⁴ Yet again, Qwest Wireless exceeded the Commission's November 30, 2003 benchmark requiring 50 percent of all new handsets sold to be location capable by achieving a 72 percent sales penetration rate of AGPS handsets.⁵

³ See Qwest Wireless, LLC and TW Wireless, LLC February 1, 2003 Phase II Implementation Status Report at 4 and Qwest Wireless, LLC and TW Wireless, LLC May 1, 2003 Phase II Implementation Status Report at 4.

⁴ See Qwest Wireless, LLC and TW Wireless, LLC August 1, 2003 Implementation Status Report at 3 and Qwest Wireless, LLC and TW Wireless, LLC November 3, 2003 Implementation Status Report at 2.

⁵ See Qwest Wireless, LLC and TW Wireless, LLC February 2, 2004 Implementation Status Report at 2-3.

An example of Qwest Wireless' good faith efforts to promote ALI-capable handsets, in an effort to achieve the Commission's handset-penetration benchmarks, is demonstrated by the acts it took in connection with its migration to the Sprint network.⁶ Qwest Wireless worked to convert its customers from handsets that were not equipped with Global Positioning Satellite ("GPS") capability to those that were, offering a free ALI-capable handset to customers as well as discounted handsets with ALI functionalities. Through these efforts, Qwest Wireless was able to replace a significant number of non-ALI-capable handsets with those having such functionality. Still there were some customers that refused to convert to an ALI-capable handset.⁷

Over and above Qwest Wireless' efforts associated with the Sprint migration, Qwest Wireless offers at least one ALI-capable handset free of charge when customers renew their contracts. Moreover, at this time, 100 percent of all new digital handsets activated on Qwest Wireless' service are ALI capable.

B. Qwest Wireless' Current Penetration Rates Are Substantial

Qwest Wireless is currently at an 88.87 percent ALI-capable handset penetration rate. That rate reflects a 1.5 percent increase from September 2005 to October 2005. Assuming a constant 1.5 percent increase each month, Qwest Wireless should achieve a handset penetration rate of somewhere between 90-94 percent by December 31, 2005.⁸

⁶ Qwest Wireless is now a Sprint Mobile Virtual Operator ("MVO"). Qwest Wireless briefly described its migration from a facility-based CMRS provider to a reseller of Sprint services in Qwest Wireless, LLC November 1, 2004 Implementation Status Report at 2 and Qwest Wireless, LLC February 1, 2005 Implementation Status Report at 2.

⁷ See note 10 below.

⁸ Compare "Request for Limited Waiver," Verizon Wireless, filed Oct. 17, 2005 at i, 25-26 (noting that Verizon Wireless will have in excess of 93 percent penetration by year end "falling just short of the 95% milestone").

Qwest Wireless still has some customers using non-GPS-capable handsets. Still it expects that even modest customer churn,⁹ buttressed by customer purchasing trends toward newer technologies and features, will allow it to reach the Commission's required 95 percent penetration rate sometime during the first half of 2006.¹⁰

The facts outlined above document that Qwest Wireless has persistently demonstrated its commitment to meeting the Commission's handset penetration benchmarks.¹¹ Qwest Wireless' performance clearly is not indicative of a carrier "undertak[ing] a minimalist approach" to

⁹ The Commission expressly relied on customer churn in establishing its handset penetration benchmarks. See *In the Matter of Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Third Report and Order, 14 FCC Rcd 17388, 17411-13 ¶¶ 50-52 (1999) ("E911 Third R&O"). Thus, to the extent that customer churn is materially different (in either direction) from that anticipated by the Commission, the difference affects the reasonableness of the established benchmarks. The relationship between customer churn and compliance with the Commission's penetration benchmarks has been observed also by the National Emergency Number Association ("NENA") (see generally *Analysis of the E911 Challenge*, prepared by Monitor Group and sponsored by NENA, December 2003), and Professor Dale Hatfield, a consultant retained by the Commission to review and analyze wireless E911 issues and deployments. See generally "A Report on Technical and Operational Issues Impacting the Provision of Wireless Enhanced 911 Services," Professor Dale N. Hatfield at 44 (rel. October 16, 2002).

¹⁰ It should be noted, however, that no one can accurately predict future customer purchasing conduct. As noted by the CTIA – The Wireless Association and Rural Cellular Association ("CTIA/RCA") Joint Petitioners, customers that have wireless service to protect against emergencies or for peace of mind may well be reluctant to have to "learn" a new handset. *Joint Petition for Suspension or Waiver of the Location-Capable Handset Penetration Deadline*, filed June 30, 2005 at 2 ("CTIA/RCA Joint Petition"). This reluctance might also surface in those situations where a mobile user does not leave her home community. *Id.* at 4. And in these kinds of situations, a non-compliant handset that can complete a basic 911 call is a better alternative than no wireless service (if carriers were required to terminate service to those customers refusing to upgrade to an ALI-capable handset) because of a customer refusal to upgrade to an ALI-capable handset.

¹¹ See *In the Matter of Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Fourth Memorandum Opinion and Order, 15 FCC Rcd 17442, 17457-58 ¶ 44 (2000) ("E911 Fourth MO&O") (stating that in any request for waiver, carriers should document their efforts to come as close as possible to full compliance).

wireless E911 compliance.¹² Indeed, just the opposite is demonstrated. Accordingly, the facts warrant Qwest Wireless being granted a modest extension of time to comply with the Commission's rules.

II. QWEST WIRELESS' WAIVER PETITION MEETS THE STANDARD FOR WAIVERS GENERALLY, AS WELL AS WIRELESS E911 WAIVERS

A. Qwest Wireless Demonstrates Good Cause For Waiver Relief And Outlines A Realistic Path To Compliance

A waiver is appropriate whenever special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest.¹³ Moreover, Qwest Wireless' waiver request is specific, focused, and limited in scope. It outlines a realistic path to compliance that incorporates current penetration levels, anticipated future purchasing patterns and customer preferences. Accordingly, the Waiver Petition meets the requirements for an E911 Waiver.¹⁴

Qwest Wireless' Waiver Petition results in large part from customer purchasing behavior outside of Qwest Wireless' direct control. Yet while Qwest Wireless is unable to meet the penetration benchmark levels required by December 31, 2005, it has previously exceeded *each* of the Commission's penetration-level requirements. Given Qwest Wireless' past pattern of compliance and its limited request for relief, it hopes the Commission looks favorably on its request and grants the instant Waiver Petition.

¹² *Id.* at 17458 ¶ 45.

¹³ 47 C.F.R. § 1.3; *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969)). *And see* 47 C.F.R. §§ 1.3, 1.925(b)(3). In those cases where the Commission fashions a regulatory regime based on predictive judgments that later prove inaccurate (*e.g.*, in this case, customer churn), the Commission must revisit its prescriptions accordingly. *See Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 445 (D.C. Cir. 1991); *Telocator Network of America v. FCC*, 691 F.2d 525, 550 n.191 (D.C. Cir. 1982); *P&R Temmer v. FCC*, 743 F.2d 918, 929 (D.C. Cir. 1984).

¹⁴ *See E911 Fourth MO&O*, 15 FCC Rcd at 17457-58 ¶¶ 43-44.

**B. The Public Interest Will Not Be Harmed By
Granting Qwest Wireless A Limited Waiver**

It is clear that the Commission anticipated that ALI-handset penetrations would occur alongside widespread Public Safety Answering Point ("PSAP") wireless E911 deployments.¹⁵ Qwest Wireless' handset penetration, while not at the full level the Commission requires by the end of 2005, is substantial within the context of PSAP deployments of wireless E911 not only across the country but in its region.¹⁶

It is now a matter of public knowledge that, primarily because of funding deficiencies, many PSAPs have been unable to keep pace with carriers' deployment of wireless E911.¹⁷ This is troubling from a wireless E911 deployment perspective because the Commission has observed the integral relationship between PSAP deployments and ALI technology: "the benefits of ALI to public safety will be realized only to the extent that PSAPs upgrade their systems to receive and use the additional information ALI provides for 911 calls."¹⁸ But given that PSAP wireless E911 deployments have not occurred to the extent anticipated by the Commission, it is clear that the public interest will not be harmed by the modest extension Qwest Wireless seeks.

¹⁵ *E911 Third R&O*, 14 FCC Rcd at 17391-92 ¶ 8 and 17407-14 ¶¶ 40-54.

¹⁶ See note 17 below. And see <http://nena.ddti.net> that reports a 30-40% PSAP wireless E911 deployment rate in Qwest Wireless' 14-state region.

¹⁷ See *CTIA/RCA Joint Petition* at 3-4 outlining the state of PSAP deployments and arguing that "[t]he primary hurdle to handset exchanges is that Phase II E911 service is not yet available in most U.S. communities." And see generally *Communications Daily*, Sept. 23, 2005, "NENA: 50% of PSAPs not E-911 Phase II-Capable" (only 39% of counties currently accepting Phase II calls; fewer than 70% of PSAPs will be capable of receiving and using Phase II ALI by year-end 2007), report of the United States General Accounting Office, "Uneven Implementation of Wireless Enhanced 911 Raises Prospect of Piecemeal Availability for Years to Come," issued November 2003.

¹⁸ *E911 Third R&O*, 14 FCC Rcd at 17407-08 ¶ 40.

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **QWEST WIRELESS, LLC REQUEST FOR LIMITED WAIVER OF AUTOMATIC-LOCATION-INFORMATION-CAPABLE HANDSET PENETRATION REQUIREMENTS** to be:

- 1) filed with the FCC via its Electronic Comment Filing System in CC Docket No. 94-102 and
- 2) served via e-mail on the FCC's duplicating contractor as identified on the attached service list;

Richard Grozier
Richard Grozier

November 15, 2005